COURT, U. S.

No. 74-805

Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1974

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**CLIFFORD BINDER,**

*Petitioner,*

vs.

**PEOPLE OF THE STATE OF ILLINOIS,**

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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## PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

---

Petitioner Clifford Binder respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District, affirming the judgment of the Circuit Court of Cook County. The judgment of the Circuit Court of Cook County is not reported. The opinion of the Appellate Court is reported at 18 Ill. App. 1058, 310 N.E. 2d 661 (1974) (Abstract only). The

opinion of the Appellate Court is included as an appendix to this petition. The order of the Supreme Court of Illinois denying the petition for leave to appeal without opinion is not officially reported.

## JURISDICTION

The judgment of the Appellate Court of Illinois was entered on April 1, 1974. A Petition for Leave to Appeal to the Supreme Court of Illinois was timely filed and denied on September 27, 1974. The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. Sec. 1257(3).

## QUESTION PRESENTED

Whether petitioner can constitutionally be punished for conduct which consisted of attempting to enter a locked garage by turning the door handles and exerting only enough force to determine they were locked and where there is no other evidence to indicate criminal intent.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process clause of the Fourteenth Amendment:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

## STATEMENT

On August 20, 1972, at 2:00 a.m. police officers of the City of Chicago were standing in a yard at the rear of 2720 Birchwood Avenue. They had been stationed there for about two hours on a "stake out" or surveillance for a reputed "cat burglar" operating in the area. (Tr. p. 14) The officers observed petitioner walk down the alley, enter the yard at the rear of 2716 West Birchwood, walk diagonally across the backyard toward a side door of a garage, place his hand on the door knob and move his shoulder against the door. (Tr. 18)

The door was locked and did not open. Petitioner then walked around to the front of the garage, put his hand on the handle of the overhead door and appeared to lift up on it. This door was likewise locked and did not open. (Tr. 18) Petitioner released the handle, walked away from the garage toward the side drive to the front of the house, crossed the street to the opposite side, walked down the sidewalk some distance, stepped into a gangway where he was arrested by police officers. (Tr. 31) At the time of his arrest, petitioner was walking in the direction of his car parked a block and a half away. (Tr. 32) When the officers asked him if he attempted to enter the garage, he said, "Yes, but I didn't get in, and that he was walking through the yard on the way to his car." (Tr. 22) The officers walked petitioner to his car, where he gave the officers the keys to his car, and under the front seat they found his wallet and determined that he resided in Glenview, Illinois. (Tr. 23)

On cross examination, the officers stated that they observed petitioner at the garage, but did not seek to place him under arrest. As he walked to the front of 2716 Birch-

wood, the officers proceeded to the front of 2718, stood on the front lawn, observed petitioner cross the street and walk down the sidewalk. When they saw him step into the gangway of the house across the street, they apprehended him. (Tr. 31) The officers testified that there was no damage to, or marks of entry on the door, and that petitioner never entered the garage, never looked into any window of the garage, and the inside of the garage was not lighted. (Tr. 27, 28) Petitioner was at each door no more than a couple of seconds. (Tr. 29) They also testified that while petitioner was at the police station being processed, the "cat burglar" burglarized another home in the area of the arrest. (Tr. 32)

A stipulation was entered into the record relative to ownership of the garage and lack of permission to enter, and that there were no physical marks or damage to the building, and that when the owner observed the garage it was in the same condition as it was prior to August 20, 1972.

Petitioner was charged by the Cook County, Illinois Grand Jury with the offense of attempt burglary. A jury returned a verdict of guilty and petitioner was sentenced to a term of 3 to 9 years in the Illinois State Penitentiary.

On Appeal to the Appellate Court of Illinois, First District, petitioner argued that the evidence failed to disclose conduct by petitioner that constituted a substantial step toward the commission of a crime. The Appellate Court considered the issue on the merits and affirmed. As to the contention raised in this petition, the court said:

> "The defendant's first contention is that the evidence was insufficient to support his conviction beyond a reasonable doubt because his actions did not constitute a substantial step toward the commission of burglary and that the evidence was insufficient to es-

tablish intent to commit a burglary. While intent is a necessary element of the offense, it may and often must be proven circumstantially by inference drawn from the facts of the individual case. (*People* v. *Reynolds*, 131 Ill.App.2d 348, 268 N.E.2d 545.) Here, the evidence demonstrated that at 2:00 a.m. the defendant walked through an alley and into a yard at 2716 W. Birchwood. He walked to the side door of the garage, tried the doorknob and, finding the door locked, hit the door with his shoulder in an attempt to open it. When the attempt failed, he walked around to the front of the garage and attempted to lift the overhead door. His actions were sufficient to constitute a substantial step toward the commission of the offense." (Appendix, p. 2)

The question was raised again in a Petition for Leave to Appeal to the Illinois Supreme Court, which was denied.

## REASONS FOR GRANTING THE WRIT

### PETITIONER CANNOT CONSTITUTIONALLY BE PUNISHED FOR CONDUCT WHICH CONSISTED OF ATTEMPTING TO ENTER A LOCKED GARAGE BY TURNING THE DOOR HANDLES AND EXERTING ONLY ENOUGH FORCE TO DETERMINE THEY WERE LOCKED AND WHERE THERE IS NO OTHER EVIDENCE TO INDICATE CRIMINAL INTENT.

The question presented by the facts of this case is whether petitioner can constitutionally be deprived of his liberty for three to nine years for conduct that amounted to no more than an unsuccessful attempt to enter a locked garage. We respectfully submit that the conviction is so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process clause of the Fourteenth Amendment. *Thompson* v. *City of Louisville*, 362 U.S. 199, 80 S.Ct. 624 (1960)

The only conduct engaged in by petitioner in this case consisted of the act of turning the door knob of a locked garage door, and at the same time placing his shoulder against the door with no greater force than required to determine it was locked, followed by the act of placing his hand on the handle of an overhead door and lifting up and finding it locked. Taken in the light most favorable to the State, and even in view of petitioner's later statement to police that he sought to enter the garage, the evidence supports only the conclusion that he attempted to enter the garage. The act of attempting to enter a garage, even where as here that attempt is made at 2:00 a.m. several miles from defendant's residence, not only

fails to establish beyond a reasonable doubt the offense of attempt burglary, but fails to constitute evidence of the commission of a crime at all.

More importantly as concerns this argument, the conduct engaged in by this petitioner, the mere act of trying to get into a garage, could not constitutionally be made subject to criminal sanctions. The mere attempt to enter a garage is not a crime. Conduct which does not constitute a crime may not be punished.

There is no contention that the petitioner was attempting to force open the door with his shoulder or otherwise to break into the garage. The act of placing his shoulder against the door was done simuletaneously with the act of turning the door knob to determine if it was open. Once having determined that it was locked, the petitioner proceeded to the overhead door, determined that it also was locked and left the area. There was no damage to the doors or evidence that they were forced.

In *Thompson* v. *City of Louisville,* 362 U.S. 199, the defendant was arrested in a cafe while dancing around by himself on the dance floor. When the officers entered, they asked the manager of the cafe how long defendant had been there and if he had bought anything. After having been advised that he had been there a half-hour and had not bought anything, they approached the man who told them he was waiting for a bus, whereupon he was arrested for loitering. In reversing the conviction, Justice Black spoke for the Court in saying:

> "There simply is no semblence of evidence from which any person could reasonably infer that petitioner could not give a satisfactory account of himself or that he was loitering. . . . Conviction upon a charge not made would be sheer denial of due process, so is it a violation of due process to convict and punish a man without evidence of his guilt."

There being no damage to the property, petitioner was not guilty of even criminal damage to property, Chap. 38, Sec. 21-1 Ill. Rev. Stat. 1971, nor was he guilty of criminal trespass to land, Chap. 38, Sec. 21-3, for that requires prior notice from the owner not to enter. Where a state trespass statute requires notice from the owner not to enter or leave the premises, the conduct of remaining on the premises cannot be punished. *Bouie* v. *Columbia,* 378 U.S. 347 (1964) The Due Process clause prohibits punishment of persons for conduct not specifically prohibited by law, and, as stated by the Court in *Bouie* v. *Columbia,* 378 U.S. 347 (1964):

> "Application of this rule is particularly compelling where, as here, the petitioner's conduct cannot be deemed improper or immoral." (378 U.S. at 362)

Conduct which does not constitute a crime may not be punished. Since there was no evidence other than that described, there was no evidence of guilt as to any crime.

This petition should be granted because of the lower court's novel holding that the act of attempting to enter a locked garage constitutes both a substantial step toward the commission of the offense of burglary, and supports an inference of criminal intent. This is contrary to Illinois law, contrary to the law of other jurisdictions, and contrary to well-recognized authorities.

As stated in *People* v. *Matthews,* 122 Ill. App.2d 264, 258 N.E.2d 378 (1970), "The crime of attempt (Ill. Rev. Stat. 1971, Chap. 38, Sec. 8-4(a)) requires the intent to commit a specific offense and a substantial step in that direction." A person commits burglary when without authority he knowingly enters or without authority remains within a building . . . with the intent to commit therein a felony or theft. Ill. Rev. Stat. Chap. 38, Sec. 19-1.

"It was incumbent upon the prosecution to prove the following elements: (1) that the accused intended to knowingly and without authorization enter the building; (2) while concurrently intending to commit therein either a felony or a theft; and (3) that a substantial step was taken towards making such entrance."

> "An attempt to commit the crime of burglary is an act done with the intent to effectuate a burglary, carried beyond mere preparation to commit it, but falling short of its actual commission. An indictable attempt thus consists of two important elements: (1) an intent to commit burglary, and (2) a direct ineffectual act done toward its commission. An attempt to commit burglary has also been described as a crime that falls short of completion through means other than the *defendant's voluntary relenting.*" 13 Am. Jur. 2d Sec. 29, p. 336 (italics ours)

> "Mere preparation to commit an offense does not constitute the incohate of attempt. A substantial step toward the commission of the principal offense is the point where preparation ends and attempt begins, but what is a substantial step often is difficult to determine, and the criminal code does not elucidate the matter. Generally, however, a substantial step (constituting the offense of attempt) is something done which contributes materially and directly to carrying out the intent to commit the principal offense . . ." *Callaghan's Ill. Crim. Law,* Vol. 1, Sec. 8, 10.

The Model Penal Code's test of what constitutes a substantial step is: "that it must be strongly corroborative of the actor's criminal purpose." The Model Penal Code also further provides:

> "That strongly corroborative conduct *shall not include as a matter of law,* (without negativing sufficiency of other conduct) the following:
>
> (a) lying in wait, searching for or following the contemplated victim of the crime;

(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission of the crime;

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

(e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances; ". . . . *Proposed Official Draft, Model Penal Code,* Section 5.01 (2) (italics ours)

The amount of force required in seeking entry under the principal offense of burglary may shed some light on what constitutes a substantial step in the crime of attempt. In order to constitute a breaking, the action of the accused must have been such as would, without additional effort, have made any entry possible. Any breaking which requires further effort to permit entry does not constitute a breaking, as, for example, removing a window strip without opening the window, *State* v. *McCall,* 4 Ala. 643; *Gaddie* v. *Commonwealth,* 117 Ky. 468, 78 SW 162. Further, it has been questioned whether it is a breaking, where a cloth hung over a window by two nails and the top is removed from one of the nails. *Hunter* v. *Commonwealth,* 7 Gratt (Va.) 641; 13 Am. Jur. 2d Sec. 12—Force Required —Burglary.

## CONCLUSION

For the reasons urged herein, it is respectfully requested that a writ of certiorari issue to review and reverse the judgment of the Appellate Court of Illinois, First District, entered herein.

Respectfully submitted,

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# APPENDIX

## APPENDIX "A"

### Opinion of the Appellate Court of Illinois

PER CURIAM * (First District, First Division):

Clifford Binder, defendant, was found guilty after a jury trial of the offense of attempt burglary (Ill.Rev.Stat. 1971, ch. 38, par. 8-4) and sentenced to a term of three to nine years. He contends: (1) that the evidence was insufficient to support his conviction beyond a reasonable doubt; (2) that the trial court erred in instructing the jury; and (3) that the State's closing argument was improper, inflammatory and prejudicial.

Norman Brozynski, a Chicago Police Investigator, testified that on August 20, 1972, he was working with his partner, David Gould. They were on a stake-out positioned at the rear of 2720 W. Birchwood, Chicago, Illinois. At approximately 2:00 a.m., they observed the defendant walking westbound down the alley of Birchwood. The defendant entered the yard at 2716 W. Birchwood and walked over to the side door of the garage. Brozynski left his vehicle and positioned himself behind some bushes approximately 20 feet away from the defendant, who turned the knob of the garage door and attempted to open it. When the door did not open, the defendant again turned the door knob and hit the door with his left shoulder. When this also failed to open the door, the defendant walked around to the overhead door and attempted to lift it up. When that door would not open, he turned and walked southbound through the driveway out of the yard at 2716 Birchwood and entered the yard at 2721 Birchwood, where he was placed under arrest. He lived in Glen-

* Mr. Justice Goldberg did not participate.

view, Illinois. He was advised of his constitutional *Miranda* warnings and when asked what he was doing in the yard at 2716 Birchwood he replied that he was just walking through. When asked if he attempted to enter the garage, he answered, "Yes, but I didn't get in."

It was stipulated that if Mark Steinman were called to testify, he would testify that on August 20, 1972, he owned the home and garage at 2716 Birchwood, Chicago, Illinois. He did not at any time give the defendant permission to enter the garage at that address.

The defendant's first contention is that the evidence was insufficient to support his conviction beyond a reasonable doubt because his actions did not constitute a substantial step towards the commission of a burglary and that the evidence was insufficient to establish intent to commit a burglary. While intent is a necessary element of the offense, it may and often must be proven circumstantially by inferences drawn from the facts of the individual case. (*People* v. *Reynolds,* 131 Ill.App.2d 348, 268 N.E.2d 545.) Here, the evidence demonstrated that at 2:00 a.m. the defendant walked through an alley and into the yard at 2716 W. Birchwood. He walked to the side door of the garage, tried the doorknob and, finding the door locked, hit the door with his shoulder in an attempt to open it. When the attempt failed, he walked around to the front of the garage and attempted to lift the overhead door. His actions were sufficient to constitute a substantail step toward the commission of the offense. After being arrested, defendant admitted that he tried to gain entry into the garage. Based upon all of the evidence, the jury was justified in finding, from defendant's actions, that he intended to commit a burglary.

The defendant's second contention is that the trial court erred in instructing the jury on the elements of the offense. He argues that the giving of People's Instruction No. 9, which was IPI Criminal 6.07, was improper, relying upon *People* v. *Woodard,* 7 Ill.App.3d 607, 288 N.E.2d 72. In *Woodard,* the appellate court held that the indictment must allege the specific intent to commit a felony within the premises. That case, however, has subsequently been overruled by the .....

The defendant's final contention is that the closing argument of the State was improper, inflammatory and prejudicial. The defendant's privately retained counsel filed an eight-page, detailed written motion for a new trial, in which he did not argue that the closing argument of the State was prejudicial or improper. It is a well-established rule that where a written motion for a new trial was presented, all errors not presented in that motion are deemed waived on appeal. (*People* v. *Irwin,* 32 Ill.2d 441, 207 N.E.2d 76; *People* v. *Dixon,* 10 Ill.App.3d 1038, 295 N.E.2d 556.) The failure to include in his written motion the contention that the State's closing argument was prejudicial constitutes a waiver thereof, and the defendant is now prohibited from raising that issue on review.

Even if we were to consider defendant's argument on its merits, the remarks by the prosecutor in his closing argument do not constitute reversible error. The defendant argues that the prosecutor's closing argument was designed to arouse fear and passion in the minds of the jury, that the prosecutor improperly commented on the defendant's failure to testify and that the prosecutor incorrectly stated the law applicable to the case. It is a well-established rule that improper remarks by a prose-

cutor do not constitute reversible error unless they result in a substantial prejudice to the defendant. (*People* v. *DeSavieu*, 11 Ill.App.3d 529, 297 N.E.2d 336; *People* v. *Nilsson*, 44 Ill.2d 244, 255 N.E.2d 432.) The determining factor as to whether a prosecutor's closing argument constitutes reversible error is whether there was a reasonable possibility that the argument contributed to defendant's conviction. (*People* v. *Bracy*, 14 Ill.App.3d 495, 302 N.E. 2d 747.) In this case, the prosecutor's closing argument was not improper.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

## APPENDIX "B"

STATE OF ILLINOIS

Office of

CLERK OF THE SUPREME COURT
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Justin Taft
Clerk

September 27, 1974

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Chicago, Illinois 60602

No. 46743--People State of Illinois, respondent, vs. Clifford Binder, petitioner. Leave to appeal, Appellate Court, First District

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

*/s/ Justin Taft*
Clerk of the Supreme Court